

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

FOOD LION, LLC, and MARYLAND AND
VIRGINIA MILK PRODUCERS
COOPERATIVE ASSOCIATION, INC.

Plaintiffs,

v.

DAIRY FARMERS OF AMERICA, INC.,

Defendant.

Case No. 1:20-cv-00442

DECLARATION OF MIKE JOHN

I, Mike John, declare under the penalty of perjury, as follows:

1. I am the Chief Operating Officer Milk Marketing of Maryland and Virginia Producers Cooperative Association, Inc. ("MDVA"). I am over 18 years of age and competent to give this declaration. The following facts are based on my personal knowledge.
2. As COO Milk Marketing, I oversee the raw milk operations of MDVA.
3. I submit this declaration in support of the Motion for Preliminary Injunction filed by Plaintiffs Food Lion, LLC ("Food Lion") and MDVA in the above-captioned action. This declaration is intended to provide a brief summary of my knowledge and should not be construed to represent all relevant evidence that I may be aware of.
4. Raw Grade A milk ("raw milk") is a fungible, homogenous and perishable commodity. Federal milk regulations distinguish between milk used in fluid products and milk used to make cheese, yogurt, butter, milk powder, and other dairy products. The United States Department of Agriculture ("USDA") classifies Class I raw milk as milk used to produce fluid

milk for human consumption. Class II is raw milk used for soft products such as ice cream, Class III is raw milk used for cheese, and Class IV is raw milk used to produce butter or milk powder.

5. Dairy cooperatives are associations of dairy farmers who agree to collectively market their raw milk.

6. The farmer's cows produce raw milk on the dairy farm, and the farmer then collects it into a refrigerated, agitated storage vessel to be transferred into a transport insulated food grade trailer for delivery to a processor. Pursuant to USDA regulations, once raw milk is received by a processor, it is first tested to pass all regulatory and customer qualifications, and once approved, undergoes pasteurization, homogenization, separation and further processing. Milk processors bottle and package raw milk to be sold to retailers and other customers as fluid milk or other dairy products. At the time it filed for bankruptcy in late 2019, Dean Foods was the nation's largest processor of raw milk and the largest distributor of fluid milk and other dairy products to grocery stores and other retail locations.

7. MDVA is a dairy cooperative with approximately 950 member farms located in eleven states throughout the Mid-Atlantic and Southeast. As a cooperative, MDVA supports its member farmers by locating raw milk buyers, negotiating sales prices, coordinating hauling, performing testing, recording and reporting related data to milk market regulators and processors, processing raw milk into fluid milk and other retail dairy products, and by paying member farmers for their raw milk. In 2018, MDVA sold 2.9 billion pounds of raw milk and produced approximately 1% of the nation's raw milk. MDVA also owns two fluid milk processing facilities and two plants that produce bulk dairy ingredients for food manufacturers.

8. DFA is the largest dairy cooperative in the United States with over 14,000 dairy producers. DFA was formed in 1998 when four cooperatives merged and by 2000, it controlled

more than 50% of the raw Grade A milk produced in the Southeast United States. In 2018, DFA produced 52.7 billion pounds of raw milk and is more than three times larger than the next dairy cooperative, California Dairies Inc. DFA is also one of the largest milk handlers in the United States such that it not only produces, markets, and hauls raw milk, but also hauls, processes, bottles and distributes fluid milk in many of the markets in which it operates. While MDVA is a smaller dairy cooperative than DFA, MDVA acts as a strong competitive constraint on DFA in the states where MDVA operates.

9. DFA supplies most of the raw milk to milk processors located in North and South Carolina. MDVA and its affiliated cooperatives (such as Cobblestone) are DFA's sole competition for the supply of raw milk to processing plants located in the Carolinas.

10. Transportation costs and the perishability of raw milk limit the distance that raw milk may be profitably hauled. MDVA's member farmers milk their cows at least twice a day and the milk must be promptly transported from farms to milk processors. The frequency of those shipments ranges from every other day to in some cases multiple times a day. Raw milk is highly perishable and is costly to transport because it must be shipped to milk processors in insulated tanks. It is therefore essential for dairy farmers to have access to local milk processing facilities.

11. Dairy farmers that must sell their raw milk to milk processors in the Carolinas face additional challenges because there are few local fluid bottling plants. While there are a few cheese production plants in the Carolinas, MDVA members cannot send their raw milk to them because there are so few, and the plant sizes are small. North and South Carolina have two geographic features that limit the region within which raw milk can be profitably shipped – the Atlantic Ocean to the East and the Appalachian Mountains to the West. Shipping East to West

across the Appalachian Mountains is not economically feasible because of the transportation costs associated with crossing the mountains and because regulated raw milk prices in Tennessee are lower than those in North Carolina. MDVA estimates that shipping costs increase \$0.10 per gallon for every 100 additional miles shipped. These factors mean that the single most important factor influencing the long-term viability and competitiveness of MDVA's farms operating in South Central Virginia and North and South Carolina is their ability to sell their raw milk to processing facilities located in North and South Carolina. The processing facilities that MDVA owns are located in other markets and are not economically viable alternatives for these MDVA farmers.

12. These geographic and cost constraints leave MDVA's farmers that must sell raw milk to milk processors in North and South Carolina with only six potential processing plants to sell to: Milkco in Asheville, North Carolina; legacy Dean Foods' plants in High Point and Winston Salem, North Carolina, and Spartanburg, South Carolina; Kroger's Hunter Farms plant in High Point, North Carolina; and Borden's plant in Charleston, South Carolina.

13. The legacy Dean Foods' milk processing plants in the Carolinas are centrally located and access to these facilities is critical to the MDVA farmers that are located in South Central Virginia and the Carolinas.

14. During the 2010s, MDVA's farmers' access to legacy Dean Foods' milk processing facilities was slowly restricted and then ultimately completely cut off. Before 2013, MDVA had a cost-sharing "pooling" agreement with DFA and others (through a common marketing agency known as Southern Marketing Agency ("SMA")) that permitted MDVA to sell raw milk to legacy Dean Foods' plants in the Carolinas. In 2013, MDVA sold 1.142 billion pounds of raw milk to those legacy Dean Foods' plants. In October of 2014, executives at Dean

Foods met with me and my boss, Jay Bryant. In that meeting, those Dean Foods executives expressed their appreciation for MDVA's quality and service and said they were looking forward to MDVA's continued raw milk supply in 2015. Then, in late 2014, I received a call from Evan Kinser at Dean Foods. During that call, Mr. Kinser informed me that Dean Foods would be moving substantial raw milk volume from MDVA to DFA beginning in 2015. In early 2015, Dean Foods' executive Shea Braun advised Jay Bryant that the reason for this change was the fact that DFA wanted to enforce its exclusive supply arrangement with Dean Foods and replace MDVA's volume in the legacy Dean Foods plants. I understand that Mr. Braun affirmed that MDVA's quality and service were excellent, but that he had no choice but to comply with DFA's request. Over the next four years, Dean Foods reduced the volume of raw milk that it purchased from MDVA. In 2019, MDVA was completely cut off from access to the legacy Dean Foods milk processing facilities in North and South Carolina. In fact, by that time, MDVA was foreclosed from selling its raw milk to any legacy Dean Foods plant in any of the regions where MDVA markets its members' raw milk.

15. I believe legacy Dean Foods plants have the capacity and incentive to accept and process milk from MDVA farmers that sell raw milk to processing facilities in the Carolinas. It is my understanding that all three of the legacy Dean Foods facilities in the Carolinas are operating at less than 75% capacity and the legacy Dean Foods High Point plant is operating at around 50% capacity.

16. Before the Dean Foods asset sale to DFA, DFA had an arrangement with Dean Foods involving twenty separate one-year renewable milk supply contracts for certain Dean Foods plants and a multi-million dollar promissory note that only would become payable if Dean Foods breached any of the supply contracts. The note had a twenty-year term, effectively

creating a twenty-year exclusive arrangement that required Dean Foods to accept DFA's raw milk whenever DFA chose to enforce its rights. I believe if DFA had to compete with MDVA to sell raw milk to the legacy Dean Foods facilities located in the Carolinas, DFA would have to sell its raw milk at lower prices.

17. MDVA understands that the legacy Dean Foods milk processing facilities in the Carolinas refused to accept milk from MDVA farmers because DFA exerted control over Dean Foods' decisions concerning the cooperatives from which it purchased raw milk. The asset sale ensures that DFA's control of these purchase decisions will be absolute and permanent.

18. The twenty-year supply arrangement between DFA and Dean Foods was set to expire next year, in 2021. MDVA had expected that, upon expiration of that supply arrangement, it would once again have the opportunity to compete with DFA to sell raw milk to the legacy Dean Foods processing facilities in the Carolinas.

19. In the absence of the asset sale of the legacy Dean Foods facilities located in North and South Carolina to DFA, no further business relationship or financial ties would have existed between DFA and Dean Foods after the expiration of their long-term supply arrangement, except for standard milk purchasing contracts going forward. MDVA was the backup bidder for the Dean Foods plant in High Point, North Carolina. If the legacy Dean Foods High Point processing facility were divested and MDVA or another bidder were allowed to purchase it, MDVA would have full opportunity to compete to supply that plant with its raw milk needs.

20. As it lost access to the legacy Dean Foods processing facilities in North and South Carolina, MDVA was able to patch together a network of processing facilities in the Carolinas that could buy MDVA's raw milk, including the Hunter Farms and Milkco plants in North

Carolina, and the Borden plant in South Carolina. This patchwork system that MDVA cobbled together is inefficient because it requires MDVA to incur additional transportation costs associated with shipping raw milk, and, in any event, is not sustainable long term.

21. Two of the milk processing facilities to which MDVA currently has access are aligned with specific retailers and serve first and foremost as a source of the milk that those retailers sell. The Hunter Farms High Point, North Carolina processing facility is owned by, and affiliated with, the Kroger grocery store chain. Milkco's Asheville, North Carolina processing facility is owned by, and affiliated with, the Ingles Markets grocery store chain.

22. MDVA is at serious risk of soon losing access to the Hunter Farms processing facility for a substantial portion of the raw milk volume that MDVA currently supplies to that plant.

23. The other North Carolina facility (Milkco) is operating at 75% capacity and purchases most of its milk from a DFA affiliate. The Milkco facility also only produces milk in corrugated boxes rather than milk crates, which greatly reduces the number of potential purchasers from that facility.

24. The owner of the other processing facility in Charleston, South Carolina (Borden) recently filed for bankruptcy so the long-term viability of that plant is in question. The Borden facility also is not a sustainable option for MDVA because it is located on the southern portion of the South Carolina coast, far from the vast majority of MDVA's farmers. Shipping to the Borden facility results in higher hauling costs and logistical problems for MDVA.

25. Shipping raw milk north to milk processing facilities is also not a viable option for MDVA because the shipping costs associated with transporting raw milk that distance from the farms sharply cuts into the already thin margins for MDVA farmers. This also works against

the intent of the Federal Order system in this part of the country, which is designed to encourage the flow of milk from North to South. Because MDVA does not believe that it will be able to continue to utilize the Hunter Farms, Milkco, and Borden plants located in the Carolinas at anywhere near the current aggregate levels of MDVA's raw milk sales to those plants, MDVA was relying heavily on the prospect of competing for access to the legacy Dean Foods' processing plants in the Carolinas once the supply arrangement with DFA expired. MDVA would still have current access to those plants in the Carolinas if DFA had not told Dean Foods that it had to discontinue purchasing MDVA's raw milk and instead purchase it from DFA, and DFA had not acted to secure its control of those plants through the asset sale.

26. If DFA assumes unrestricted operation of the legacy Dean Foods facilities, MDVA will suffer a permanent loss of access to those facilities. I believe DFA will have the power and incentive to foreclose MDVA and other non-DFA cooperatives from access to its facilities, and the transaction will decisively and permanently foreclose any possibility that MDVA will be able to sell raw milk to legacy Dean Foods' processing facilities in North and South Carolina.

27. This has happened in the recent past. In 2017, DFA purchased Cumberland Dairy, a former independent processor located in New Jersey, with which MDVA had previously enjoyed a profitable and mutually beneficial relationship that included the sale of raw milk and a successful co-packing partnership. Almost immediately following DFA's takeover of the facility, MDVA lost all of its raw milk sales to Cumberland as Cumberland quickly switched to DFA for its raw milk supply.

28. DFA and MDVA also compete to recruit member dairy farms. All other things being equal, I believe many farmers prefer to be members of MDVA among other reasons

because MDVA historically and typically operates at a lower cost than DFA and MDVA can pass along those efficiencies to its members.

29. If DFA assumes unrestricted operation of the Carolina facilities, MDVA ultimately will be substantially foreclosed from access to milk processing facilities in the Carolinas. As a result, many MDVA farmers will be forced to leave MDVA and join DFA, because the prospect of selling raw milk to local processing facilities will only be available if a dairy farmer is a member of DFA. As it loses members to DFA, MDVA eventually will be significantly weakened or pushed out of the market for the supply of raw milk in North and South Carolina, leaving DFA as the only economically significant dairy cooperative in the Carolinas.

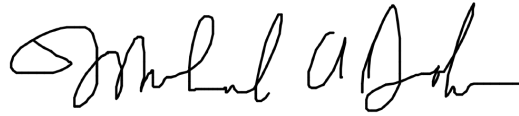
30. If even one of the legacy Dean Foods facilities in the Carolinas, the High Point facility, were not ultimately owned and controlled by DFA, MDVA would be able to retain its members and recruit DFA farmers because those farmers would have the potential to market their milk more profitably because of MDVA's general and historical operating efficiencies.

31. MDVA opposed the Dean Foods/DFA sale in the bankruptcy court and submitted a bid to purchase the Dean Foods' processing facility in High Point, North Carolina. MDVA remains a willing and viable buyer for the High Point plant and would continue to operate that plant as a vigorous competitor to DFA.

32. MDVA previously analyzed whether it could feasibly build a new milk processing facility in North Carolina, but after careful consideration, determined that doing so would not be feasible. MDVA made that decision based on the high costs associated with building a milk processing facility and the declining demand for fluid milk in the United States and across North America.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on May 13, 2020, at Moneta, Virginia.

A handwritten signature in black ink, appearing to read "Mike John", written over a horizontal line.

Mike John